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Freezing Injunctions in common law: the *Broad Idea* revolution

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Statutory provisions (in Commonwealth countries)

- Sect. 25 Civil Jurisdiction and Judgments Act 1982 (CJJA 1982)
 - Applicable only in England and Wales
 - Introduced in 1982 to aid proceedings in other EU countries
 - Expanded worldwide in 1997
- s.37(1) Senior Courts Act 1981 (UK)
- s.37(3) Senior Courts 1981 (UK)
- Sect. 11A, Grand Court Law enacted in Cayman Islands in 2015
- Sect. 49C, South African Competition Act 1998 (as amended)
- Section 21M(1) of the High Court Ordinance in Hong Kong
- No similar statutory provisions in BVI (thus applying common

The pre *Broad Idea* scenario at common law

- The Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA [1979] AC 210 (House of Lords)
- Mercedes Benz v Leiduck [1996] AC 284 (a HK appeal to the Privy Council)
- Interlocutory Orders presupposes the existence of a substantive action (actual or potential) falling within the jurisdiction of the High Court;
- Mere presence of assets in the jurisdiction is required but not sufficient;
- Good arguable case (Lakatamia Shipping v Morimoto, 2019 CA)
- Real risk of assets dissipation
- It's just and reasonable to grant the order and comity principles of caution

Convoy Collateral Ltd v Broad Idea International Ltd

[2021] UKPC 24 – The context

Convoy Collateral Limited (CCL) applied to the BVI court for ex parte freezing injunctions in support of proceedings in Hong Kong against the defendant in those proceedings, Dr Cho, a Hong Kong resident, and Broad Idea, a third-party BVI company, and non-cause of action defendant (NCAD) controlled by Dr Cho. The freezing injunction was granted by the first instance judge (relying on the *Black Swan* jurisdiction) but overturned by the Court of Appeal, which concluded, following *The Siskina* and *Mercedez Benz*, the BVI court had no power to grant a freezing order absent the existence of domestic proceedings claiming substantive relief.

The issues before the Privy Council were: (i) whether, under the BVI's civil procedure rules (the EC CPR), the court has the power to authorise service on a defendant outside the jurisdiction of a claim form

Convoy Collateral Ltd v Broad Idea International Ltd

[2021] UKPC 24

- A “*ground-breaking exposition of the law of injunctions*” (per Sir Geoffrey Vos at [221])
- CCL brought proceedings in Hong Kong against Dr Cho, a Hong Kong resident and sometime director of CCL’s parent company
- CCL applied for freezing injunctions in the Commercial Court of the Eastern Caribbean Supreme Court in the British Virgin Islands against:
 - Dr Cho; and
 - Broad Idea International Ltd, a BVI company of which Dr Cho was a director and a shareholder (50.1%)
- Broad Idea had shares consisting of a minority interest (18.85%) in a Bermuda exempted company quoted on the Hong Kong stock exchange
 - it was argued that this could be used to satisfy an eventual Hong Kong judgment against Dr Cho which would be enforceable in BVI
- There was no substantive claim against Broad Idea

Broad Idea International

- First instance decision in BVI:
 - Freezing injunction granted against Broad Idea (the BVI company) even though there was no cause of action against the company
 - CCL had a good arguable case against Dr Cho in its Hong Kong proceedings, which were capable of resulting in a money judgment enforceable in the BVI
- Court of Appeal in the BVI:
 - Reversed the decision of the first instance judge
 - no power to grant an injunction against Broad Idea where no cause of action lay against it and where the cause of action against Dr Cho lay abroad
- Privy Council – *obiter dicta*
 - the majority approved the concept of free standing proceedings for a freezing injunction to restrain an ‘innocent’ third party from dissipating assets (a NCAD)
 - Power to assist enforcement through the court’s process of a prospective or existing foreign judgment

Broad Idea International

- The underlying justification for freezing injunctions = the court's inherent power to prevent the abuse or frustration of the court's process
- freezing injunctions are ancillary to judgments (as opposed to causes of action)
- Hence, it is not necessary for a cause of action to have accrued
- A court of equity has power to grant freezing injunctions against a party subject to its personal jurisdiction in aid of any judgment enforceable through the court's process (the judgment may be domestic or foreign, existing or prospective, and does not necessarily have to be against the injunction defendant)

Broad Idea International

- The majority noted that:

“[the enforcement principle] can, in an expanded form, apply to any conduct which would diminish the value of assets against which a judgment could potentially be enforced, even if that conduct does not involve dealing with those assets directly”, and

“[t]here seems no reason in principle why the expanded form of the enforcement principle should not be applied in an appropriate case to assets held by a ‘non-cause of action defendant’

Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24

- The “new” principles (a recap)

- Personal Jurisdiction (and “service” gateway) against the defendant (still) needed
- Applies also to aid judgements or awards of a foreign court capable of being enforced as if it were a judgment of the domestic court
- Chabra defendants (NCADs) possible targets (TSB Private Bank International v Chabra [1992] 2 All ER 245)
- Good arguable case (now as likelihood of enforceability of a foreign judgment)
- No jurisdiction on the substantive action required any longer
- Respondent holds or controls assets against which such judgment (foreign or domestic) could be enforced
- Real risk of dissipation (ordinary course of business excluded),

Chabra Orders

Requirements

- Ancillary to a substantive claim, or an intended claim, against the CAD
- Claimant must have a good arguable case on the merits of the substantive claim
- Good reason to suppose that the assets in the hands of the third party would be amenable to execution of a judgement obtained against the CAD
- Real risk of assets dissipation
- It must be just and convenient to make the order (exceptional remedy to be used withy caution)

* CAD = Cause of Action Defendant

Chabra Orders

Relevant case law

- PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov et al [2013] EWHC 422 (Comm).
- Yukos Capital S.a.r.l. v OJSC Rosneft Oil Company [2010] EWHC 784 (Comm)
- Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam) [2011] EWHC 3143 (Comm).

Practical impact for practitioners and litigants

- I. Relationship between common law position and s. 25 CJA 1982 in England (and equivalent elsewhere). In England unlikely to make any real difference.
- II. Potentially very relevant in cross-border disputes. Broad Idea facilitates a concerted campaign of freezing injunctions obtained in England and in other key jurisdictions. Relevance of BVI for high concentration of off-shore companies.
- III. Levelling the playing field between BVI and the Cayman Islands (post 2015)
- IIII. An additional “common law” tool against Chabra respondents in English Courts applications ?

Thank you!

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